

NO. 41505-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL RAYMOND LONGAN,

Appellant.

**STATE'S SUPPLEMENTAL BRIEFING IN RESPONSE
TO PERSONAL RESTRAINT PETITION**

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I. INTRODUCTION

This court lifted the stay in this matter and directed the parties to file supplemental briefs addressing our Supreme Court's opinions in *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126 (2012); *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012); *In re Pers. Restraint of Morris*, ___ Wn.2d ___, 288 P.3d 1140 (2012); and *State v. Sublett*, ___ Wn.2d ___, 292 P.3d 715 (2012). Longan's supplemental briefing addresses *Paumier*, *Wise* and *Morris* but does not address *Sublett*.

II. SUMMARY OF RELEVANT FACTS

At the start of voir dire in Longan's 2008 trial, a potential juror, Ms. Wood, answered one of the judge's preliminary questions:

JUROR: I do have a health problem that could cause me to be late, or not be very efficient.

JUDGE: Okay. If – if you know what our schedule is, can you make that work?

JUROR: I – there's – it's doubtful – I mean, there's a doubt that I can.

JUDGE: Okay.

JUROR: If you'd like, I could talk to you privately, if you'd like to know more about that.

JUDGE: All right, we'll come back to it. What is your name?

JUROR: [Ms.] Wood.

7RP 12-13.

At the conclusion of voir dire, the trial judge explained to the jury the peremptory challenge process. 7RP 107. The judge then called the attorneys to the bench and held a brief, two-minute sidebar. *Id.* The judge then called the attorneys and Ms. Wood into the hallway. *Id.* The two-minute hallway conference with the juror was held on the record and was as follows:

JUDGE: I was looking at that again, and I – I don't think this is a problem; all right? Hang on just a moment, until [defense counsel] comes out. Okay, I just wanted to ask you about the medical situation, preferably without a whole lot of people hearing.

JUROR: Yes, I appreciate that. It's kind of complicated. First, I have [inaudible] and I just – and that's a blood disease, by the way, okay? So – which causes me to have – to need phlebotomies, that type of things. But now I have a secondary condition, and for some reason, I'm having to go the bathroom. Like this morning, I thought I would be late because I was in the bathroom a lot. And, so, that's – that was my concern, that I wouldn't even be here on times [sic]. So, that – if I were on the [inaudible] the jury –

JUDGE: We take a break every hour and a half, or so, and if – I always tell the jury if anybody wants a break raise your hand and we'll take one, I'm not gonna ask you why.

JUROR: Oh.

JUDGE: Would that be sufficient for you, do you think?

JUROR: If I could do that – I can – that ad they have on TV for a while, that's kind of me, you know, right now.

JUDGE: Yeah, so you think that'll be sufficient for you?

JUROR: Yes, but then like – what happens if I'm late, like this morning? See, I just – I could've been late.

JUDGE: Yeah, okay.

JUROR: Now, I'm fine now, it just seems like I just have that – that one time in the morning, and, so that was – but I'm just fine to be [inaudible] here if you don't want me having to do that.

JUDGE: Okay. All right. Thank you ma'am.

JUROR: Sure. Thank you.

7RP¹ 107-110.

The following exchange then took place between the judge and the attorneys in the hallway on the record:

STATE: I think we're going to need [inaudible] the record.

JUDGE: Mr. Ladouceur, for the record, at this point, your client was comfortable with not coming out here to participate in this?

¹ "7RP" refers to the verbatim report of proceedings on June 23, 2008 (jury selection).

Mr. LADOUCEUR: I specifically advised him of his right to do so, and he indicated that he had no problem with my advice; that he would decline the invitation; and would be happy to put that on the record.

7RP 109.

The parties went back in the courtroom and exercised their peremptory challenges. 7RP 110. The jury was seated and sworn and then excused. 7RP 111-13. About 13 minutes after the hall conference, the judge inquired of Longan and his attorney in the courtroom, on the record:

JUDGE: First of all, we had a brief conversation with Ms. Wood about her medical issues. Mr. Ladouceur, you indicated that you'd spoken to Mr. Longan's right to be there with your client [sic], he chose not to be present when we had that conversation; is that accurate?

Mr. LADOUCEUR: That's correct.

JUDGE: And Mr. Longan, you agree with that?

LONGAN: Yes, sir.

3RP² 19-20.

The transcript of voir dire is 104 pages, while the transcript of the hall conference is three pages. 7RP 3-110. The transcript shows that

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voir dire started at 9:22 a.m. and concluded at 11:23 a.m., while the hall conference began at 11:25 a.m. and ended at 11:27 a.m. 7RP 3, 107, 110.

Longan filed a timely notice of appeal. CP 191. The Court of Appeals affirmed the judgment and sentence, addressing the open courts issue. Longan filed a motion to reconsider the Court of Appeals decision, which was denied. Longan filed a petition for discretionary review by the Supreme Court, which was also denied. The Court of Appeals issued a mandate on April 14, 2010. Longan then filed this PRP within the allowable one-year time limit.

III. ARGUMENT

A. There was no closure, as the hallway was open to the public.

Longan contends in his supplemental briefing that the State is required to present its own competent evidence to dispute Longan's claim that the hallway was not open to the public. RAP 16.9 states that the respondent to a PRP should "identify in the response all material disputed questions of fact." The State in its initial response identified the public's access to the hallway as a material disputed issue. However, attached to this supplemental briefing is the affidavit of the county's facilities services

director, which shows that at the time of Longan's trial, the hallway was open to the public. *Appendix L*. The statement contained in the affidavit of Patricia Bird-Hoffman that the hallway was not open to the public at the time of Longan's trial is, at best, inaccurate. A petitioner must prove error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Longan fails in his effort to prove that the hallway was closed to the public at the time of his trial.

To decide the open courts issue in Longan's case, this court should first consider whether the conversation at issue implicates the public trial right, thereby constituting a closure at all. *Sublett*, ___ Wn.2d ___, 292 P.3d at 721. A closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *Id.*, quoting *State v. Lormer*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

The facts of Longan's case are distinguishable from those in *Paumier*, *Wise*, and *Morris*, in which portions of voir dire of several jurors were conducted in the judge's chambers. In Longan's case, the existence of the juror's medical issue was announced by the juror in the courtroom during voir dire. Voir dire later concluded. The judge then called the

juror into the public hallway to discuss the logistics of her medical issue, a conversation that lasted three short minutes. Longan stated that he consented to not being present for the conversation. Additionally, the judge then announced in the courtroom that the brief conversation in the hallway was regarding the juror's medical issue.

The brief hallway conversation was open to the public; therefore, there was no closure.

B. The conversation was regarding a ministerial issue; therefore, the right to a public trial does not extend to it.

On direct appeal, the reviewing court held that Longan's open courts issue was meritless because there was no courtroom closure since the discussion with the juror occurred in a public hallway. It is the State's position that the discussion in the public hallway was also not a closure because of the subject matter of the discussion. This argument is discussed extensively in the State's initial response to Longan's PRP.

The facts in Longan's case are distinguishable from those in *Paumier*, *Wise*, and *Morris*. In *Paumier*, the judge individually questioned four jurors in her chambers during voir dire regarding health issues, criminal histories and familiarity with the defendant or the crime.

Paumier, ___ Wn.2d ___, 288 P.3d at 1128. In *Wise*, 10 jurors were individually questioned in the judge's chambers regarding health issues, relationships with witness, relationships with police officers, and criminal histories. *Wise*, ___ Wn.2d ___, 288 P.3d at 1116. In *Morris*, 14 jurors were individually questioned in the judge's chambers regarding personal experience with sexual violence. *Morris*, ___ Wn.2d ___, 288 P.2d at 1143. While jurors in these three cases discussed health issues in chambers, the in-chambers voir dire of these jurors also included issues that would reveal any bias that might affect their ability to serve as fair and disinterested jurors in those cases. In Longan's case, voir dire had concluded, and the judge simply asked the juror whether her medical issue could be resolved by the court allowing any breaks she would need. This is purely ministerial and not part of the adversarial process. It is more akin to *State v. Rivera*, 108 Wn.App. 645, 32 P.3d 292 (2001) (public trial right not implicated when trial court addressed a juror's complaint about another juror's hygiene).

Ministerial proceedings may include scheduling, order of witnesses, statutory or administrative empanelment of jurors, including general qualifications and even hardship not specific to a defendant's case.

See *State v. Irby*, 170 Wn.2d 874, 887, 246 P.3d 796, 803 (2011) (Madsen, J., dissenting) (arguing that excusal of potential jurors for personal reasons such as general hardship is distinct from voir dire when the potential jurors are introduced to the substantive legal and factual issues of a defendant's case; while the latter is a critical stage at which the defendant has a right to be present, the former is not). The U.S. Supreme Court has “expressly distinguished ‘voir dire’ from the ‘administrative empanelment process.’” *Id.* at 888, 246 P.3d at 803 (citing *Gomez v. United States*, 490 U.S. 858, 874 (1989)).

Longan’s right to a public trial was not implicated by this conversation.

C. Longan consented to any error and thus should not be able to benefit from it.

“The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial.” *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Longan stated that he had no objection to remaining in the courtroom while the attorneys and the judge spoke to the juror in the

hallway. Because he consented to this process, he should not be granted a new trial because of it.

D. Any closure was not structural error.

A structural error affects the framework within which the trial proceeds and renders a criminal trial an improper vehicle for determining guilt or innocence. *Paumier*, ___ Wn.2d ___, 288 P.3d at 1130. The three-minute conversation with the juror in the public hallway regarding her medical issue, if found to be a closure, cannot be said to have affected the framework within which Longan's trial proceeded. Likewise, it cannot be said to have rendered his trial an improper vehicle for determining guilt or innocence. Any error in the hallway discussion does not meet the high standard for structural error and does not belong in the same class of errors as complete denial of counsel, a biased trial judge, or racial discrimination in the selection of a grand jury. Not all closures are fundamentally unfair; therefore, not all closures are structural errors. *Momah*, 167 Wn.2d at 150-52, 217 P.3d 321. Longan can show no prejudice from this discussion.

E. Longan has not met his burden to show he is entitled to relitigate the open courts issue.

In PRPs, the appellate courts ordinarily will not review issues previously raised and resolved on direct appeal. In order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue. *In re Personal Restraint Petition of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); *In re Personal Restraint Petition of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden can be met by showing an intervening change in the law “ ‘or some other justification for having failed to raise a crucial point or argument in the prior application.’ ” *Taylor*, 105 Wn.2d at 688, 717 P.2d 755 (quoting *Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)); see *Vandervlugt*, 120 Wn.2d at 432, 842 P.2d 950. A collateral attack by PRP on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and on direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

Longan raised the open courts issue on direct appeal, and the Court of Appeals rejected his argument on the merits, finding that there was no courtroom closure. Longan points to no intervening change in the law or other reason to justify this court reconsidering its holding regarding the open courts issue. Furthermore, he gives no reason why the affidavit he has provided could not have been provided earlier. Because he has not met his burden of showing that the ends of justice would be served by reexamining this issue, it should not be reviewed again as part of his PRP.

Paumier, *Wise* and *Sublett* all involved cases on direct appeal. *Morris* was the result of a personal restraint petition. However, Longan's case is distinguishable from *Morris*. In *Morris*, our Supreme Court held that where appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review. The open courts issue was in fact raised and considered on direct review, so Longan is not entitled to relief on collateral review.

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JUROR: Now, I'm fine now, it just seems like I just have that – that one time in the morning, and, so that was – but I'm just fine to be [inaudible] here if you don't want me having to do that.

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JUROR: Sure. Thank you.

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STATE: I think we're going to need [inaudible] the record.

JUDGE: Mr. Ladouceur, for the record, at this point, your client was comfortable with not coming out here to participate in this?

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JUDGE: First of all, we had a brief conversation with Ms. Wood about her medical issues. Mr. Ladouceur, you indicated that you'd spoken to Mr. Longan's right to be there with your client [sic], he chose not to be present when we had that conversation; is that accurate?

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JUDGE: And Mr. Longan, you agree with that?

LONGAN: Yes, sir.

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III. ARGUMENT

A. There was no closure, as the hallway was open to the public.

Longan contends in his supplemental briefing that the State is required to present its own competent evidence to dispute Longan's claim that the hallway was not open to the public. RAP 16.9 states that the respondent to a PRP should "identify in the response all material disputed questions of fact." The State in its initial response identified the public's access to the hallway as a material disputed issue. However, attached to this supplemental briefing is the affidavit of the county's facilities services

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The facts of Longan's case are distinguishable from those in *Paumier*, *Wise*, and *Morris*, in which portions of voir dire of several jurors were conducted in the judge's chambers. In Longan's case, the existence of the juror's medical issue was announced by the juror in the courtroom during voir dire. Voir dire later concluded. The judge then called the

juror into the public hallway to discuss the logistics of her medical issue, a conversation that lasted three short minutes. Longan stated that he consented to not being present for the conversation. Additionally, the judge then announced in the courtroom that the brief conversation in the hallway was regarding the juror's medical issue.

The brief hallway conversation was open to the public; therefore, there was no closure.

B. The conversation was regarding a ministerial issue; therefore, the right to a public trial does not extend to it.

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Longan’s right to a public trial was not implicated by this conversation.

C. Longan consented to any error and thus should not be able to benefit from it.

“The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial.” *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Longan stated that he had no objection to remaining in the courtroom while the attorneys and the judge spoke to the juror in the

hallway. Because he consented to this process, he should not be granted a new trial because of it.

D. Any closure was not structural error.

A structural error affects the framework within which the trial proceeds and renders a criminal trial an improper vehicle for determining guilt or innocence. *Paumier*, ___ Wn.2d ___, 288 P.3d at 1130. The three-minute conversation with the juror in the public hallway regarding her medical issue, if found to be a closure, cannot be said to have affected the framework within which Longan's trial proceeded. Likewise, it cannot be said to have rendered his trial an improper vehicle for determining guilt or innocence. Any error in the hallway discussion does not meet the high standard for structural error and does not belong in the same class of errors as complete denial of counsel, a biased trial judge, or racial discrimination in the selection of a grand jury. Not all closures are fundamentally unfair; therefore, not all closures are structural errors. *Momah*, 167 Wn.2d at 150-52, 217 P.3d 321. Longan can show no prejudice from this discussion.

E. Longan has not met his burden to show he is entitled to relitigate the open courts issue.

In PRPs, the appellate courts ordinarily will not review issues previously raised and resolved on direct appeal. In order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue. *In re Personal Restraint Petition of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); *In re Personal Restraint Petition of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden can be met by showing an intervening change in the law “ ‘or some other justification for having failed to raise a crucial point or argument in the prior application.’ ” *Taylor*, 105 Wn.2d at 688, 717 P.2d 755 (quoting *Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)); see *Vandervlugt*, 120 Wn.2d at 432, 842 P.2d 950. A collateral attack by PRP on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and on direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

Longan raised the open courts issue on direct appeal, and the Court of Appeals rejected his argument on the merits, finding that there was no courtroom closure. Longan points to no intervening change in the law or other reason to justify this court reconsidering its holding regarding the open courts issue. Furthermore, he gives no reason why the affidavit he has provided could not have been provided earlier. Because he has not met his burden of showing that the ends of justice would be served by reexamining this issue, it should not be reviewed again as part of his PRP.

Paumier, *Wise* and *Sublett* all involved cases on direct appeal. *Morris* was the result of a personal restraint petition. However, Longan's case is distinguishable from *Morris*. In *Morris*, our Supreme Court held that where appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review. The open courts issue was in fact raised and considered on direct review, so Longan is not entitled to relief on collateral review.

F. Reversal is not the proper remedy.

If a petitioner makes a prima facie showing of prejudice arising from constitutional error, but the issue cannot be resolved on the existing record, the case must be transferred to the trial court for an evidentiary hearing. *State v. Pirtle*, 136 Wn.2d 467, 473, 965 P.2d 593 (1998). However, the petitioner must first demonstrate that he has competent, admissible evidence establishing facts which would require relief. *Id.* As the affidavits presented make evident, the hallway was open to the public at the time of Longan's trial although by the time of Ms. Bird-Hoffman's affidavit, it no longer was. Longan fails to present competent evidence that the hallway was closed to the public.

However, if this court finds that there is a factual issue, the remedy should be to remand the case to the trial court for resolution of that issue so that this court could then resolve the legal issue.

IV. CONCLUSION

For the reasons stated above and in the State's original response, Longan's personal restraint petition should be denied.

Respectfully submitted this 25th day of February, 2013.

SUSAN I. BAUR
Prosecuting Attorney

By:

A handwritten signature in cursive script, appearing to read "Michelle L. Shaffer", written over a horizontal line.

MICHELLE L. SHAFFER
WSBA #29869
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

STATE OF WASHINGTON)
) ss
COUNTY OF COWLITZ)

Ron Junker, being duly sworn on oath, deposes and says:

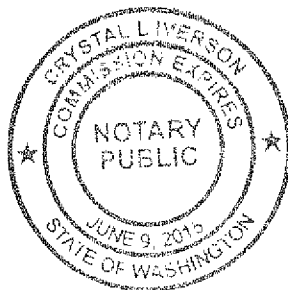
I am the facilities services director for Cowlitz County and my duties include supervision of maintenance at the courthouse. At the State's request, I have examined the photographs attached to the affidavit of Patricia Bird-Hoffman. The signs in the photographs were not installed until October 20, 2010. Until that time, the public was not restricted from the back hallways outside the courtrooms.

In August 2011, keypads were installed on the doors to the back hallways, preventing public access, except for county employees and bar members with an access code.

DATED this 25th day of February, 2013.

Ron Junker

SUBSCRIBED AND SWORN to before me this 25 day of Feb, 2013.



[Signature]
Notary Public in and for the
State of Washington
Commission expires: June 9, '15

CERTIFICATE OF SERVICE

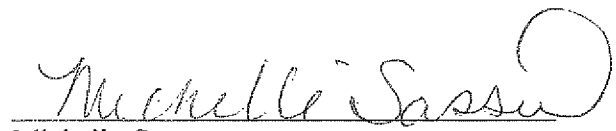
Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Jeffrey E. Ellis
Law Office of Alsept & Ellis
621 S.W. Morrison Street, Suite 1025
Portland, OR 97205

JeffreyErwinEllis@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 25th, 2013.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 25, 2013 - 4:09 PM

Transmittal Letter

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Court of Appeals Case Number: 41505-4

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Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:
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